72-1457

FILED
APR 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.
72-1457

ESTATE OF EFFIE KELLS JONES, Deceased, CITIZENS FIRST NATIONAL BANK OF RIDGEWOOD, ADMINISTRATOR, C. T. A.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Estate of Effie Kells Jones, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals, Third Circuit, affirming the judgment of the United States Tax Court which determined a deficiency in estate taxes against Petitioner in the amount of $83,511.87.

OPINIONS BELOW

The opinion of the Court of Appeals is in the form of a judgment-order affirming the decision of the Tax Court for the reasons set forth in its opinion reported at 56 T. C. No. 4 (1971), both of which are included in the Appendix to this Petition as Addenda A and B.

JURISDICTION

The judgment order sought to be reviewed was entered January 30, 1973. An order denying a Petition for Rehearing was entered February 23, 1973. The statutory provision to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Can the Commissioner of Internal Revenue apply the federal estate tax law to embrace trust assets over which taxpayer's decedent, during her lifetime, had virtually no actual or potential right of enjoyment? Stated otherwise, can the federal estate tax law oppressively enforce a tax on property in a person's estate over which the person during her lifetime had no meaningful power of enjoyment?

2. Should this Court correct the imbalance created by the Court of Appeals for the Third Circuit in its exclusive series of far-reaching cases interpreting the powers of appointment provisions of the Internal Revenue Code of 1954, all favorable to the government against the taxpayer?

3. Whether or not Congress may adopt a taxable event definition not having any rational basis in the legislative scheme and history, without violating due process requirements.

4. Whether or not Congress may enact retroactive estate tax legislation depriving a taxpayer of vested interests established by prior law, without violating due process.

5. Should this Court help settle the trenchant inconsistencies in the taxability of jointly-held powers of appointment.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Amendment V, United States Constitution: " * * * no person shall . . . be deprived of . . . property, without due process of law; * * *"

Int. Rev. Code of 1954, Section 2041 (Addendum C of Appendix).

Powers of Appointment Act of 1951 (65 Stat. 91-95, 1951) (essentially §2041 *ibid.*).

Treasury Regulations on Estate Tax (26 C.F.R.) §20.2041-1 (Addendum D of Appendix).

STATEMENT OF THE CASE

The facts before the Tax Court were fully stipulated—the following is a summary:

Petitioner is the personal representative of decedent, Effie Kells Jones, who died on November 11, 1965, a resident of New Jersey. Decedent's husband, J. Morgan Jones (hereinafter called the "testator"), executed a will on April 29, 1941 in which he created a testamentary trust. The testator died July 10, 1949 without ever having republished his previously executed will. On July 22, 1949, testator's widow was appointed co-executor and co-trustee of the testamentary trust, along with a corporate fiduciary. The widow received a life estate in the trust with further provision that on her death the trust would continue and the income paid to the testator's daughter of a prior marriage, with remainder payable to the latter's surviving issue or as she might appoint by will in the absence of issue. The power in the trust provision states, ". . . I authorize and empower my executors during the period of their executorship and my trustees thereafter, in cases of emergency or in situations affecting her care, maintenance, health, welfare and well-being to pay over to my said wife (in addition to the said income payments) part or all of the principal of my residuary estate. . . ."

Decedent never made nor requested any invasion of the trust corpus and there has been no release, renunciation, disclaimer or exercise of the power. Decedent devised her entire estate to a natural daughter, with no provision for her step-daughter, the successor beneficiary of the trust in question. No issue was born of the marriage between testator and decedent; each, however, had been married previous to their marriage to each other in 1932, with each having had one child of the prior marriage.

The immediate question is whether or not the asserted power of appointment is limited by an ascertainable standard of the kind referred to in Section 2041 of the Int. Rev. Code of 1954. The courts below held that the authority of the decedent as a co-trustee constituted a general power of appointment and that it is not excepted by the requisite ascertainable standard, *viz.*, "health, education, support or maintenance."

Petitioner submits that the power is delimited by the objective standard contemplated by the statute and that the question is not taxable because of the inability of decedent to have compelled an exercise thereof or to have enjoyed any significant beneficial interest therein under the law of New Jersey.

Petitioner also submits that the Powers of Appointment Act of 1951 in defining a pre-1942 power must be understood to have intended "July 1, 1951," as the definitional date of such a power, since the use of "July 1, 1949" as the definitional date of a pre-1942 power has no rational basis in the statutory scheme and is therefore arbitrary and capricious. Furthermore, the statute operates as an impermissible retroactive law.

The basis for jurisdiction in the Tax Court is the estate tax deficiency determined by the Commissioner of Internal Revenue. Int. Rev. Code of 1954, §§6212, 6213 and 7442.

ARGUMENT

POINT I

A need exists for first-time review by this Court of the powers of appointment provisions of the Internal Revenue Code of 1954.

The question of the taxability of the power of appointment in this case goes to the fundamental issue of the proper breadth of estate taxation. Moreover, it affects issues of prime importance to tax practitioners, estate planners and institutional trustees, all of whom are faced day-to-day with trust powers already created which cannot be revised or which may have been drawn without literal regard to the language of the taxing statute.

Int. Rev. Code of 1954 §2041(b)(1), excepts from the definition of a general power of appointment, "a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent." Assuming that the power held by decedent in this case constitutes a general power of appointment, the power to invade corpus in fairness should be held to come within the statutory exception and therefore, the trust corpus should not be included in decedent's estate.

The Tax Court concluded arbitrarily that the words "welfare and well-being" went beyond the statutory standard of an excepted power relating to a donee's "health, education, support or maintenance." This Court ought not to accept a conclusion which on its face is unreasonable and which in light of the power in full context, is clearly unsound. This arbitrariness towards an incidence of taxa-

tion reflects an attitude of the Commissioner which should not go unchallenged. Moreover, the undisputed rule, acknowledged but not applied by the courts below, is that the tax consequences of a power will be determined by local law. New Jersey decisions make clear that invasions of corpus in discretionary trusts will not be allowed except in strict keeping with the settlor's limitations. *Hicks v. Jones*, 138 N.J. Eq. 280, 47 A.2d 894 (Ch. 1946); *Corlies v. Allen*, 36 N.J. Eq. 100 (Ch. 1882); *Reeve v. Beekman*, 42 N.J. Eq. 613, 9 Atl. 27 (Ch. 1887), *aff'd* 44 N.J. Eq. 295, 18 Atl. 80 (E. & A. 1888); *Coflin v. Watson*, 78 N.J. Eq. 307, 79 Atl. 275 (Ch. 1911), *aff'd* 79 N.J. Eq. 643, 83 Atl. 1118 (E. & A. 1911).

The affirmance below of the Tax Court's decision constitutes the broadest application of Section 2041(b)(1) of the Internal Revenue Code of 1954, appearing in any reported case. This means that the Commissioner of Internal Revenue has successfully established that in the absence of a literal compliance with the ascertainable standard exception to the estate tax includability of a general power of appointment, every such power held by any decedent in a testamentary or *inter vivos* trust—even though unexercised—is taxable. This is so notwithstanding the presence of limitations on the power, or, as in the present case, the virtual absence of any actual or potential beneficial enjoyment of the trust assets to which the power pertains. The affirmance of the Tax Court's decision sanctions the imposition of estate tax by the Commissioner upon assets not owner, used or realistically capable of enjoyment by the taxpayer's decedent. This is a far-reaching interpretive power by the Commissioner of Internal Revenue and the present case affords this Court opportunity to prevent such a tax imposition, contrary to the intent of Congress.

A further reason justifying the allowance of this Petition is that the Third Circuit almost alone has established

a series of case rulings on the taxability of powers of appointments: *Strike Executors v. McGuiness*, 330 F.2d 234 (3rd Cir. 1964), *cert. den.* 379 U.S. 836, *reh. den.* 379 U.S. 910 (1964); *Miller v. United States*, 387 F.2d 866 (3rd Cir. 1968) and *Peoples Trust Co. of Bergen County v. United States*, 412 F.2d 1156 (3rd. Cir. 1969). The present case and *Miller* are rigid interpretations of the Section 2041, going beyond the philosophy and intent of the Estate Tax provisions of the Internal Revenue Code of 1954. This Petition affords an opportunity for the Court to reject such rigidity and restore some balance to the Congressional intent in taxing estates.

Recently this Court in *United States v. Byrum*, 408 U.S. 125 (1972), recognized an external standard limitation on a grantor-retained trust power and therefore excluded the trust asset from the grantor's estate. The present case affords an opportunity to mould the thrust of the *Byrum* holding and to develop a coherent body of law relating to estate taxation of assets in which decedents have no direct interest.

Point II

Congress may not adopt and the Government may not enforce arbitrary, capricious and special tax legislation.

Although Petitioner will avoid detailed argument, it is necessary to review the statutory scheme and history of Int. Rev. Code §2041 in order to demonstrate Petitioner's position.

The 1954 Code, Section 2041(b)(3), under the heading, "Definitions—For purposes of subsection (a)—," contains the following:

> (3) "Date of creation of power.—For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942."

This definition is arbitrary, irrational and clearly inconsistent with the purposes and intent of the statutory scheme regarding powers of appointments, insofar as the definition of a pre-1942 power requires the person executting such power, that is the testator, to have died before "July 1, 1949."

The first Federal estate tax, enacted in 1916 (39 Stat. 756), did not include powers of appointment and in *United States v. Field*, 255 U.S. 257 (1921), this Court held that property subject to a power of appointment was not taxable to the estate of the donee of the power even though he had a general power which he exercised by will. The Revenue Act of 1918, 40 Stat. 1057, however, in Section 402(e), provided a tax upon powers of appointment to the extent of general powers of appointment which were exercised by will or by a transfer in contemplation of death or taking effect at death. This statute remained unchanged until the 1942 Revenue Act by which Congress broadened the scope of the taxable powers and included both the exercise and the non-exercise of a general power of appointment, including a power to invade by a trust beneficiary. Revenue Act of 1942, 56 Stat. 942, Section 403. The 1942 Act, expressly exempted powers from Section 403 if the donee could only appoint "within a class which does not include any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants(other than the decedent) of the creator of the power or his spouse,

spouses of such descendants, . . . and charities." In other words, as of the effective date of the 1942 Act, the power of appointment of the present decedent, having been created by will prior to that enactment, was expressly exempted because the power was limited to benefit the spouse of the creator of the power.

The Revenue Act of 1942, effective October 21, 1942, applied to the estates of decedents dying after that date (Section 401). Furthermore, the statute provided that as to any previously created power (that is, executed by instrument prior to the enactment of the 1942 statute), no tax was imposed if the donee of the power released the power or reduced it to a non-taxable power prior to a specified date which initially was for one year, or, if the donee died before the extended date without exercising the power. Section 403(d)(3). This period was successively extended to July 1, 1951 (64 Stat. 260, 1950).

There existed "widespread dissatisfaction" with the provisions of the 1942 Act. See Report by the Senate Finance Committee to accompany Pub. L. No. 58, 82nd Cong. 2nd. Sess. (1951). As a result of efforts of bar associations and other groups to relax the tax on powers of appointment, the Congress undertook a revision and adopted the Powers of Appointment Act of 1951 (65 Stat. 91-95, 1951), amending Section 811(f) of the 1939 Code, 26 U.S.C.A., and which became Section 2041 of the 1954 Code.

As to the effective date of the 1951 law, the statute expressly provided that it took effect as of October 21, 1942, the date of the 1942 Act, and to estates of decedents dying after that date.

By adoption of the 1951 Act, Congress made a clear distinction between powers pre-existing 1942 and those which are created after that date, and in the taxability of

the respective powers; for this reason, it is of critical importance to classify properly a power of appointment as to its date of creation. The statute has defined the date of creation of the power by reference to two events and two respective dates, namely, the execution of a will before October 21, 1942, and the death of the testator before July 1, 1949. Ordinarily, a power of appointment created by will is considered as having been created on the date of the testator's death. This rule is noted by the Treasury in Reg. Sec. 20.2041-1(e); the regulation also recognizes, "however," the exception to this as contained in the statute.

A. *Origin of the July 1, 1949 date.*

The 1951 Act, in establishing the definition, adopted almost verbatim the same provision from its appearance for the first time in the 1948 perfunctory statute relating to the release of powers. The 1948 statute reads as follows:

> Section 403(d)(3) [estate tax] of the Revenue Act of 1942 (relating to the release of certain powers of appointment) is hereby amended by striking out "July 1, 1948" wherever it appears and inserting in lieu thereof "July 1, 1949;" and section 452(c) [gift tax] of the Revenue Act of 1942 is hereby amended to read as follows:
>
> "(c) Release Before July 1, 1949.—
>
> "(1) A release of a power to appoint before July 1, 1949, shall not be deemed a transfer of property by the individual possessing such power.
>
> "(2) This subsection shall apply to all calendar years prior to 1949 and to that part of the calendar year 1949 prior to July 1, 1949."
>
> Sec. 2. For the purposes of sections 403 and 452 of the Revenue Act of 1942, a power to appoint created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date

> if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942. Chapter 459, Public Law 635.

The 1949 and 1950 amendments (63 Stat. 280 and 64 Stat. 260) continued the updating of Section 403(d) of the 1942 Act by striking out respectively "1949" and "1950" and inserting in lieu thereof respectively "1950" and "1951." Accordingly, as of the last amendment, Section 403(d)(3) read as follows:

> (3) The amendments made by this section shall not apply with respect to any power to appoint, created on or before the date of the enactment of this Act [Oct. 21, 1942] if it is released before July 1, 1951. • • •

B. *Nullity of the 1949 date.*

Thus, the 1949 and 1950 amendments to Section 403 effectively wiped out the definition of a pre-1942 power found in Section 2 of the 1948 statutory amendment. No other conclusion is possible; if this were not the case, the extension of time in which to release a power, tax-free, would have been fairly meaningless or at the least would have injected such confusion into the class of releasable powers so as to conclude that Congress did not know what it was doing.

A study of Section 2 of the 1948 amendment shows that the date of "July 1, 1949" was of no material significance other than to coincide with the updating purpose of the basic amendment. The substance of that change lay, not in the date, but rather in the introduction of a limitation on the concept of when the power was created, *viz;* one that was not the result of a will that was "republished", "by codicil or otherwise" after October, 1942.

The requirements that the person executing the will die before the extended date in which a donee was able to release the power, was merely a logical expression of the "republication" limitation. A person can republish his will at any time before he dies—in the case of the 1948 amendment, death would of necessity have had to occur before July 1, 1949, and hence, this is the simple explanation for insertion of the date in the amendatory language in question.

In any event, there is nothing in the 1948 amendment which justifies the inclusion verbatim of Section 2 in the 1951 statute insofar as the year "1949" is concerned. 2 Mertens' Law of Federal Gift and Estate Taxation, Sec. 19.34, p. 610, n. 69. This was an obvious legislative oversight and a proper interpretation of the Powers of Appointment Act of 1951 requires that the year "1949" in what is now Section 2041(b)(3) of the 1954 Code, be read as "1951." The Tax Court avoided Petitioner's argument by stating that the date is unambiguous and, therefore, requires no interpretation. It is not a question of the statute's not being clear—it is simply that the statute is fundamentally wrong.

C. *Arbitrary and Special Legislation.*

The arbitrary definitional date of July 1, 1949, constitutes impermissible "special legislation." *Cf.* 2 Mertens' Law of Federal Gift and Estate Taxation, Sec. 19.34, p. 610, n. 68. This is not to say that Congress may not establish certain arbitrary dates for purposes of framing uniform tax laws. In the present instance, however, the date of July 1, 1949, bears no reasonable relationship to the intent and purpose of the 1951 Act and the whole scheme of the statutory plan leads inevitably to the conclusion that where Congress intended to define a pre-1942

power by reference to the death of the donor, the only logical and fair date which could be employed by such reference, would be the enactment date of the 1951 Act.

The present case affords this Court opportunity to demonstrate that government cannot oppress a taxpayer by enacting irrational laws of taxation. Nowhere has the Commissioner shown a rationale for the "July 1, 1949" date—he can only say that Congress in enacting tax statutes can do no wrong.

The flood of innovative tax legislation and so-called tax reform bills in recent years, requires that Congress and the tax technicians on whom the legislators so heavily rely, be reminded of the constitutional limitations on their law-making powers.

Point III

The tax against Petitioner is the result of invidious retroactive legislation.

The decision below rests on a tax statute which was expressly made retroactive to 1942. The effect of this statute, as a result of the definition of a pre-1942 power and the setting in which Petitioner found itself in 1965 upon decedent's death, was to cast into her estate trust corpus assets from which decedent had enjoyed income during her lifetime, following her husband's death, but which did not belong to her and which were not controllable by her either during lifetime or upon death. These assets were taxed to her estate only because she was said to have possessed a power of invasion of the trust corpus in her lifetime; the trust corpus, however, at the time decedent became a co-trustee in 1949, was exempt from taxation and was unsusceptible of a tax at all times prior

to the 1951 statute. By that enactment, the decedent, irretrievably became locked into a future tax consequence at her death.

The Tax Court widely missed Petitioner's argument and regrettably the Court of Appeals did not announce the reasons for its affirmance. The conclusion is, nevertheless, inescapable that the taxpayer has to pay a tax by reason of retroactive legislation taking away her fixed expectations. Retroactivity in taxing statutes is not alone impermissible; however, imposing a tax on a completed gift where the donor had no reason to anticipate a taxable event makes the retrospective enactment constitutionally oppressive. *Blodgett v. Holden*, 275 U.S. 142 (1927).

The present case affords opportunity to refine the standards by which a taxing statute may operate retroactively. There exist no definitive rulings by this Court as to the tests to be applied in permitting retroactive taxation. The decisive test is said to be whether or not the taxpayer's expectation has been unreasonably disappointed by the retroactive legislation. *Wilgard Realty Co., Inc. v. Commissioner*, 127 F.2d 514, 517 (2d Cir. 1942), *cert. den.* 317 U.S. 655; *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 727 (1960).

In *Ewing v. Rountree*, 228 F. Supp. 137 (M.D. Tenn. 1964) *aff'd* 346 F.2d 471 (6th Cir. 1965), *cert. den.* 328 U.S. 918, the court of appeals affirmed a district court decision that a power of appointment was not limited to an ascertainable standard and that there was no impermissible retroactive tax. On the question of ascertainable standard, the court of appeals affirmed for reasons expressed in the district court opinion; on the question of validity of the statute, the court held that the taxing statute as applied to the facts of the case was prospective in its application and not violative of the due process clause

of the Fifth Amendment, citing *Fernandez v. Wiener*, 326 U.S. 340 (1945). In *Rountree*, the decedent's husband had executed a will in 1945 and died in 1947, vesting in the donee a power of appointment without limitation. Against the claim that the tax was retroactive, the court of appeals noted, "In applying the estate tax, we look only to the question of whether or not the deceased possessed a taxable power as of the date of her death in 1958. *Cf. Walter v. United States*, 341 F.2d 182, 185 (C.A. 6) and cases therein cited. . . ."

The present case is distinguishable from *Rountree* in that in the latter the will was executed after 1942, and the right of non-taxable release was unavailing the donee under such circumstance. A difference between a "release" and a "renunciation" was incorporated for the first time in the provisions of the 1951 Act, in which such transactions are distinguished, in the case of post-1942 powers. Decedent here, however, had no way of renouncing the power since she had "accepted" it by reason of her appointment as co-trustee in 1949, twelve days after the testator's death.

None of the previous cases of this Court has focused on the precise kind of retroactive tax problem presented by this case which therefore offers an opportunity to clarify earlier decisions of the Court. See discussion in 73 Har. L. Rev., *supra*, at 708-710.

Point IV

A novel question exists as to the inconsistent tax treatment of jointly-held powers of appointment.

There now exists an important area of estate tax law involving powers of appointment which is in a state of uncertainty that can measurably be resolved by the pre-

sent case, *viz.*, the anomaly of the taxability of a power of appointment residing in a donee decedent, not limited by the requisite ascertainable standard and the non-taxability of the same power where it rests in the hands of a disinterested third-party trustee. In both instances the beneficial advantages can be exactly the same but in one case, the power is taxable and in another, it is not, because of a mere formal difference. Thus, if the present decedent had not been named a co-fiduciary, the trust assets would not have been includible in her estate. Paradoxically, her actual role as a co-fiduciary gave her no greater beneficial interest.

The Tax Court failed even to address itself to this contradictory problem. For a very recent case illustrating this contradiction, see *Estate of Mary Joyce Cox*, 59 T.C. No. 80 (1973). This Court should resolve the problem and thereby emphasize the real taxable standard, that is, the breadth of beneficial right to the property. *Cf. United States v. Byrum, supra.*

CONCLUSION

When a modest estate has to pay an $83,511.87 tax for assets its decedent never possessed or enjoyed, there is presented a fundamental issue of constitutional proportions which only this Court can fairly resolve. This Petition should be granted.

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Addendum "A"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-2050

ESTATE OF EFFIE KELLS JONES, Deceased, CITIZENS FIRST NATIONAL BANK OF RIDGEWOOD, ADMINISTRATOR, C. T. A.,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

(TAX COURT DOCKET No. 5138-69)

Argued January 29, 1973

Before: SEITZ, Chief Judge, ALDISERT, Circuit Judge and LACEY, District Judge.

Judgment Order

After reviewing appellant's contentions, for the reasons set forth in the opinion of the Tax Court, 56 T.C. No. 4 (1971), it is

ORDERED AND ADJUDGED that the decision of the Tax Court of the United States is affirmed.

Costs taxed against appellant.

By the Court,

/s/ Collins J. Seitz
COLLINS J. SEITZ
Chief Judge

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

Dated: January 30, 1973

Addendum "B"

UNITED STATES TAX COURT

DOCKET No. 5138-69

ESTATE OF EFFIE KELLS JONES, Deceased, CITIZENS FIRST NATIONAL BANK OF RIDGEWOOD, ADMINISTRATOR, C. T. A.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

---

56 T.C. No. 4
(Filed April 8, 1971)

A power of appointment authorized the decedent and a bank as co-trustees of a testamentary trust to pay over to the decedent part or all of the principal of the trust in cases of emergency or in situations affecting her care, maintenance, health, welfare and well-being

Held: The power exercisable in favor of the decedent was not limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent.

Held, further: The decedent as co-holder of the power had at the time of her death a general power of appointment created after Oct. 21, 1942.

Held, further: The classification of the power of appointment as a power created after Oct. 21, 1942 does not require the application of retroactive legislation.

Joseph J. MacDonald, for the petitioner.

John James O'Toole, for the respondent.

QUEALY, Judge: The respondent determined a deficiency in estate tax in the amount of $83,511.87. The ultimate issue in this case is whether Effie Kells Jones had a general power of appointment sufficient to cause the corpus of her husband's testamentary trust to be includable in her gross estate under section 2041.[1]

FINDINGS OF FACT

The facts were fully stipulated, and these facts and exhibits incorporated therein are so found.

The petitioner is a fiduciary as administrator c.t.a. of the estate of Effie Kells Jones, deceased, by appointment of the Bergen County Surrogate's Office, State of New Jersey, under date of December 6, 1965. Petitioner, at the time of filing the petition herein, had its principal office in Ridgewood, New Jersey. The Federal estate tax return was filed with the district director of internal revenue, Newark, New Jersey on January 19, 1967.

Effie Kells Jones (hereinafter the "decedent") married J. Morgan Jones in 1932. At that time, the decedent was 46 years of age, and her husband was 55 years of age. Each had been married previously and each had one child of the prior marriage. J. Morgan Jones' child, Emma Louise Rector, was already married in 1932 and bore children in 1935 and 1938.

J. Morgan Jones executed a will on April 29, 1940. The will provided for a testamentary trust in which the decedent and his daughter were given successive life estates. At his daughter's death, the trust principle was to be dis-

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

tributed to the surviving issue of his daughter or if there were no such issue then according to the terms of his daughter's will.

Article Sixth of the will provided, in part:

SIXTH: I give, devise and bequeath to my executors and trustees hereinafter named, all the rest, residue and remainder of my estate, real and personal, of whatever nature and wheresoever situate, including therein any property real and personal, over which I may have power of appointment by will, to collect, recover, receive and take possession thereof, to manage, control, administer, invest and reinvest the same and to receive, collect and recover the income thereon, and to hold and/or dispose of the principal thereof, and the income thereon according to the following terms and conditions and upon the following trusts:

(a) If my said wife, Effie K. Jones, survive me, to pay to her the net income of my residuary estate or of the trust thereof during her lifetime.

(b) If my said wife, Effie K. Jones, survive me, I authorize and empower my executors during the period of their executorship and my trustees thereafter, in cases of emergency or in situations affecting her care, maintenance, health, welfare and well-being to pay over to my said wife (in addition to the said income payments) part or all of the principal of my residuary estate or of the trust thereof, or to use and apply part or all of the principal of my residuary estate, or of the trust thereof, for such purposes. The judgment and discretion of my executors or trustees as to what constitutes an emergency or any such situation, and as to the continuation of any emergency or any such situation and as to how much of

the principal of my residuary estate or the trust hereof shall be paid or used therein and to whom it shall be paid and as to how it shall be used and applied and the purposes for which it shall be paid, used or applied, shall be final and conclusive and not subject to inquiry or attack in any court, jurisdiction or proceeding and shall be binding upon all those who shall have or may become entitled to any right, title or interest in or to my said residuary estate or the trust thereof, including any who may be minors or under other legal incapacity or not in being.

In the event of any such payment or use of principal, there shall not be any obligation to refund or reimburse the principal out of the income of my residuary estate or the trust thereof. My corporate executor or trustee shall not be under any duty to see to the application of any moneys so paid to my said wife.

(c) Upon the death of my said wife Effie K. Jones, or upon my death if my said wife Effie K. Jones predecease me, and if my said daughter Emma Louise Rector be then living, to pay to my said daughter Emma Louise Rector during her lifetime the net income of my residuary estate or of the trust thereof or of so much of my residuary estate or of the trust thereof as may then remain.

(d) Upon the death of my said wife, Effie K. Jones or upon my death, if my said wife Effie K. Jones predecease me, and if my said daughter Emma Louise Rector be then living, I authorize and empower my executors during the period of their executorship and my trustees thereafter, in cases of emergency or in situations affecting her care, maintenance, health and welfare and well-being to pay over to my said daugh-

ter (in addition to the said income payments) part or all of the principal of my residuary estate or of the trust thereof, or to use and apply part or all of the principal of my residuary estate, or of the trust thereof, for such purposes. * * *

Article Tenth of the will provided, in part:

TENTH: I nominate, constitute and appoint my wife, Effie K. Jones and Commercial Trust Company of New Jersey, a corporation of the State of New Jersey, having its principal office at 15 Exchange Place, Jersey City, New Jersey, Executors of and Trustees under this will.

J. Morgan Jones died on July 10, 1949. His will of April 29, 1940 was never republished by codicil or otherwise. J. Morgan Jones was survived by the decedent, his daughter, and his two grandchildren.

In addition to their interests in the testamentary trust, J. Morgan Jones distributed to the decedent and his daughter property included in his taxable estate in the following manner:

	Decedent	Emma Louise Rector
Common Stock		$23,500.00
Real Estate	$34,500.00	
Savings Bonds (jointly owned)	12,311.75	
Insurance	5,000.00	8,500.00
Personal Effects	1,030.00	
TOTAL	$52,841.75	$32,000.00

An annuity contract with Mutual Benefit Life Insurance Co. in favor of Emma Louise Rector as annuitant, was reported in the estate tax return of J. Morgan Jones,

at no value. This contract was effective 20 years after the date of death of J. Morgan Jones and is payable at an annual rate of $600 per year for life.

The estate of J. Morgan Jones filed a Federal estate tax return under date of October 4, 1950 which resulted in a determination of total estate tax liability in the sum of $20,281.67. Said return and determination did not include in the marital deduction of $52,841.75 any claim for or allowance of any portion of the assets of the testamentary trust.

The decedent and the Commercial Trust Co. of New Jersey duly qualified on July 22, 1949 as trustees and served as trustees during the lifetime of the decedent. No invasions of principal were ever made by the trustees during the lifetime of decedent and no release, renunciation, disclaimer or exercise of any power of appointment thereunder was made or effected by the trustees or beneficiary thereof during decedent's lifetime.

The decedent died on November 11, 1965, a resident of Damarest, Bergen County, New Jersey. She devised her entire estate to her natural daughter, Alta Kells Barclay.

At the time of her death, the decedent was both the life beneficiary and the co-trustee of the testamentary trust established by her husband's will. At the time of her death, the decedent had a general power of appointment created after October 21, 1942 over the corpus of the trust established under the will of J. Morgan Jones and that power was not limited by an ascertainable standard relating to health, education, support or maintenance of the decedent.

The value of the assets in the trust under the will of J. Morgan Jones as of November 11, 1965 totaled $303,-805.76. The Federal estate tax return filed for the estate

of Effie Kells Jones used the optional valuation date, and the valuation of the assets in the trust under the will of J. Morgan Jones as of November 11, 1966, the actual valuation date, was $265,335.75.

The estate tax return did not include the value of the trust assets in the taxable estate. In his notice of deficiency, the respondent increased the taxable estate by $265,335.75, the value of the assets in trust.

By an instrument dated February 21, 1969, Emma Louise Rector irrevocably refused, disclaimed, and renounced all and every right to participate in any and all decisions with respect to the payment or use of the trust assets for her personal benefit and stated that the corporate trustees solely possessed and exercised all authority and powers as testamentary trustee.

OPINION

The ultimate question in this case is whether the decedent had such a general power of appointment over the corpus of the trust established by her husband's will as to cause the value of the trust to be includable in her estate for purposes of the Federal estate tax. That question is controlled by section 2041.

Under section 2041(b)(1), a general power of appointment is defined as a power which is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate.

However, section 2041(b)(1)(A) provides that a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by "an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment," with the taxable result that the property subject to that limited power will not be included in the decedent's gross estate.

Section 20.2041-1(c)(2), Estate Tax Regs., provides that a power is limited by an ascertainable standard "if the extent of the holders' duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them)," deeming maintenance to be synonymous with support. A power to use property for the comfort, welfare, or happiness of the holder of the power is held by this regulation not to be limited by the requisite standard.

In addition, section 2041 distinguishes between general powers of appointment created before and after October 21, 1942. Property subject to a general power created before October 21, 1942 is not taxable to the estate of the donee of the power unless the power is exercised in a testamentary fashion, that is, by will or by an inter vivos conveyance taxable under sections 2035-2038. See section 2041(a)(1); section 20.2041-2(a)(c), Estate Tax Regs.; Lowndes & Kramer, Federal Estate and Gift Taxes, sec. 12.10, p. 265 (1962). However, property subject to a general power created after October 21, 1942 is taxable to the estate of the donee of the power whether or not the power was exercised. See section 2041(a)(2); section 20.2041-3(a)(2), Estate Tax Regs.

Ordinarily since a will does not speak until the testator's death, a power created by will is created at the date of the death of the donor of the power. Section 20.2041-1(e), Estate Tax Regs.; Lowndes & Kramer, supra, at sec. 12.9, p. 264. Section 2041(b)(3), however, carves out an exception to this general rule by providing that a power created by a will executed on or before October 21, 1942 is considered a power created on or before that date if the testator dies before July 1, 1949 without having republished the will by codicil or otherwise after October 21, 1942.

We will now consider, in light of this statutory background, the reasons advanced by the petitioner in support of his position that the value of the trust created by the will of J. Morgan Jones should not be included in the value of the decedent's gross estate. The petitioner makes a three pronged attack on the respondent's determination arguing (1) that the power meets the test of an ascertainable standard, (2) that the decedent as a mere coholder of fiduciary discretion did not have a general power of appointment over the trust corpus, and (3) that section 2041(b)(3) would be arbitrary and capricious as applied to the decedent unless the year 1949 in that statute is read as 1951.

LIMITATION OF THE POWER

The power to consume in "situations affecting (the decedent's) ° ° ° maintenance, (and) health," are within the statutory exception. Thus, the question is whether the remaining part of the phrase "in cases of emergency or in situations affecting ° ° ° (the decedent's care) ° ° °, welfare and well-being" conferred a power to consume which extended beyond the statutory exception of an ascertainable power for health, education, support or maintenance.

Resolution of this question requires us to look to the grant of power given to the decedent and determine whether it is clearly limited in its exercise to matters relating to health, education, support and maintenance. Peoples Trust Company of Bergen County v. United States, 412 F.2d 1156 (C.A. 3, 1969); Strite v. McGinnes, 330 F.2d 234 (C.A. 3, 1964), certiorari denied 379 U.S. 836 (1964); Estate of Josephine R. Lanigan, 45 T.C. 247 (1965). This determination of the legal rights and interests possessed by the decedent under the trust is to be made in light of local law. Peoples Trust Company of Bergen County v.

United States, supra; Miller v. United States, 387 F.2d 866 (C.A. 3, 1968); Strite v. McGinnes, supra; Estate of Josephine R. Lanigan, supra.

To determine the nature of decedent's interest under New Jersey law, we must construe the will of J. Morgan Jones "to ascertain and give effect to the 'probable intention of the testator' ", Fidelity Union Trust Co. v. Robert, 36 N.J. 561, 178 A.2d 185 (1962), having in mind that when construing wills "the controlling consideration is the effect of the words as actually written ° ° °." In re Armour's Estate, 11 N.J. 257, 94 A.2d 286 (1953); see also Peoples Trust Company of Bergen County v. United States, supra.

The will reveals that the decedent and life beneficiary was intended to be the main object of the testator's bounty. This suggests that the power conferred be given a broad construction, Sibson v. First Nat. Bank & Trust Co. of Paulsboro, 61 N.J. Super. 88, 160 A.2d 76 (1960), modified 64 N.J. Super. 225, 165 A.2d 800 (1960); see also Peoples Trust Company of Bergen County v. United States, supra. While the testator did make gifts of value to his daughter, this does not militate against our finding that the testator intended to liberally benefit his wife during her lifetime. Sibson v. First Nat. Bank & Trust Co. of Paulsboro, supra; Citizens First National Bank of Ridgewood v. United States, 288 F. Supp. 750 (D. N.J. 1968); see also Peoples Trust Company of Bergen County v. United States, supra. This conclusion that the decedent intended liberal invasions for the benefit of his wife is strengthened when one considers that Emma Louise Rector, the testator's daughter, was to receive on the death of the decedent only "the net income of my residuary estate or of the trust thereof or of so much of my residuary estate or of the trust thereof as may then remain." Cf. Strite v. McGinnes, supra.

The words used in the grant "° ° ° situations affecting (the decedent's) ° ° ° welfare and well-being ° ° °" must be given their ordinary meaning and as such go far beyond situations affecting the decedent's health, education, support or maintenance. If the decedent had sought to exercise the power granted by her husband's will, we do not believe that a New Jersey court would so limit the decedent's power to consume.

The words "comfort and well-being" [2] and "comfort, welfare, or happiness" [3] have been held to confer a power to consume which extends beyond the statutory exception, and it is clear that much like those words "welfare and well-being" also conferred on the decedent a power to consume which extended beyond an ascertainable power for her health, support, or maintenance.

While it is true that the words "in cases of emergency" were words of limitation in contrast to an absolute power the disjunctive character of the grant indicates that the decedent could have invaded the corpus in "situations affecting her ° ° ° welfare and wellbeing" whether or not that situation was an emergency. Cf. Strite v. McGinnes, supra.

We find nothing that recommends the petitioner's argument that the word "situation" limited the decedent's power of invasion and find it unnecessary to consider the words "in cases of emergency or in situations affecting (the decedent's) ° ° ° care, ° ° °" against the standards of section 2041(b)(1)(A).

DECEDENT AS COHOLDER OF THE POWER

With one exception, the estate tax is concerned only with general powers of appointment which are defined to

[2] *Miller v. United States, supra.*

[3] Sec. 20.2041-1(c)(2), Estate Tax Regs.

include powers where the decedent was at the time of death both the holder and potential appointee of the power.[4] Sections 2041(a)(2) and (b)(1). There is no question that a trustee with discretionary power to distribute corpus is considered a holder of a power under section 2041. See section 20.2041-1(b); examples (1) and (2), section 20.2041-3(c)(2), Estate Tax Regs.; 2 Mertens, Federal Gift and Estate Taxation, sec. 19.05, fn. 67, p. 498. There is also no question that the decedent in the instant case was a potential appointee as the trustee's power to invade corpus was a power exercisable in her favor. In the petitioner's view, however, the decedent did not have a general power of appointment in the definition sense of that legal concept as the decedent was only a coholder who shared her fiduciary discretion with the corporate trustee.

The estate tax treatment of a power of appointment created after October 21, 1942 which is exercisable by the decedent only in conjunction with another person is governed by section 2041(b)(1)(C) which provides that such a power is not a general power of appointment if it is not exercisable by the decedent except with the consent or joinder of (1) the creator of the power, or (2) a person having a substantial interest in the property which is adverse to the exercise of the power in favor of the decedent. With respect to the second exception, which is the only provision of possible application in the instant case, section 20.2041-3(c)(2), Estate Tax Regs., states that "(a) coholder of the power has no adverse interest merely because of his joint possession of the power * * *."

[4] A power of appointment is the power to dispose of property to an appointee which the donee, *i.e.*, the holder of the power does not own. No distinction exists for estate tax purposes between potential and actual appointees of powers of appointment created after October 21, 1942. In other words, it does not matter whether or not a power is exercised in the decedent's favor.

As much has been recognized by the courts which have included the value of trust corpus in a decedent's gross estate where the decedent was the coholder with a corporate trustee of the discretionary power to distribute corpus and the potential appointee of that property. Miller v. United States, supra; Estate of Josephine R. Lanigan, supra.

The decedent had a general power of appointment in the definitional sense of that legal concept under section 2041. The fact that the corporate trustee had to join with the decedent in the exercise of the power does not change the fact that the decedent had at the time of her death a general power of appointment within the meaning of sections 2041(a)(2) and (b)(1). Estate of Josephine R. Lanigan, supra.

POST 1942 POWER

J. Morgan Jones died on July 10, 1949. The power of appointment held by the decedent was "created" on that date. Section 20.2041-1(e), Estate Tax Regs. Had J. Morgan Jones died 10 days earlier, that is on June 30, 1949, or before, the power held by the decedent would be considered a power created on or before October 21, 1942 under section 2041(b)(3) and the value of the property subject to that power would not have been included in the decedent's gross estate as the decedent failed to exercise that power. See section 2041(a)(1).

In the petitioner's view, it is a matter of simple statutory construction to read to the July 1, 1949 cutoff date contained in section 2041(b)(3) as July 1, 1951. The provision of the statute is as follows:

> (3) Date of creation of power—For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be

considered a power created on or before such date *if the person executing such will dies before July 1, 1949,* without having republished such will, by codicil or otherwise, after October 21, 1942. (Emphasis added.)

The provision clearly states the cutoff date to be July 1, 1949. Where the language of a statute is clear and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion. Caldwell v. United States, 114 F.2d 995 (C.A. 3, 1940); Alexander C. Yarnall, 9 T.C. 616 (1947), affd. 170 F.2d 272 (C.A. 3, 1948).

The petitioner also contends that the classification of the power held by the decedent as a power created after October 21, 1942 requires the application of retroactive legislation, section 2041(b)(3), and therefore to apply section 2041 to the decedent would be to subject her to taxation in violation of the fifth amendment by taking property without due process of law.

Section 2041 was for the most part carried forward from the Powers of Appointment Act of 1951, 65 Stat. 91. That statute was applied to the decedent as of the date of her death in 1965, that is 14 years after the statute was enacted. Thus, the taxing statute on its face appears to apply prospectively to the decedent.

However, the petitioner contends that the Powers of Appointment Act of 1951 deprived the decedent of derivative rights with respect to that power when that Act in 1951 limited testamentary powers of appointment created on or before October 21, 1942 to powers of appointment created by wills executed on or before October 21, 1942 only if the testator died before July 1, 1949. Specifically, the petitioner contends that under the law in effect at the

date of death of the testator, J. Morgan Jones, on July 10, 1949 the power would have been classified as a power created on or before October 21, 1942 but that the law effective on July 10, 1949 was retroactively changed by the Revenue Act of 1951.

The petitioner's contention must be rejected for at least two reasons. First, the petitioner has not shown that the power in question would have been considered a power created on or before October 21, 1942 under section 403 of the Revenue Act of 1942, 56 Stat. 944. Our reading of that law indicates no attempt to change the general rule that a power of appointment created by will is created on the date of the testator's death.

Second, assuming that the power could be classified as one created on or before October 21, 1942 under the Revenue Act of 1942, that classification was changed not in 1951 as assumed by the petitioner but in 1948, a full year prior to the testator's death. See S. Rept. No. 382, 82d Cong., 1st Sess. (1951), p. 8, which states as follows:

> Section 1 (b) of the bill (Powers of Appointment Act of 1951) provides that a power of appointment created by a will executed on or before October 21, 1942, the date of enactment of the 1942 act, shall be considered a preexisting power (i.e., powers created on or before October 21, 1942) if the testator dies before July 1, 1949, without having republished the will, by codicil or otherwise, after October 21, 1942. *This merely continues in force a provision which was enacted in 1948 (Public Law 635, 80th Cong.).* (Emphasis added.)

See also section 2, Pub. L. No. 635, 80th Cong., 2d Sess. (June 12, 1948), 1948 U.S. Code Cong. Serv., Vol. 1, p. 403, which states as follows:

° ° ° For the purposes of sections 403 and 452 of the Revenue Act of 1942, a power to appoint created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise after October 21, 1942.

The taxing statute as applied in this case is prospective in its application and does not violate the due process clause of the fifth amendment. Ewing v. Rountree, 346 F.2d 471 (C.A. 6, 1965).

Decision will be entered under Rule 50.

Addendum "C"

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 2041. Powers of Appointment.

(a) [as amended by Sec. 18(a), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960] in General.—The value of the gross estate shall include the value of all property—

(1) Powers of appointment created on or before October 21, 1942.—To the extent of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent—

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive;

but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof. If a general power of appointment created on or before October 21, 1942, has been partially released so that it is no longer a general power of appointment, the exercise of such power shall not be deemed to be the exercise of a general power of appointment if—

(i) such partial release occurred before November 1, 1951, or

(ii) the donee of such power was under a legal disability to release such power on October 21, 1942, and such partial release occurred not later than 6 months after the termination of such legal disability.

(2) Powers created after October 21, 1942.—To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment

created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

(3) Creation of another power in certain cases.—To the extent of any property with respect to which the decedent—

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under section 2035, 2036, or 2037,

exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

(b) Definitions.—For purposes of subsection (a)—

(1) General power of appointment.—The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that—

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

(B) A power of appointment created on or before October 21, 1942, which is exercisable by the decedent only in conjunction with another person shall not be deemed a general power of appointment.

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person—

(i) If the power is not exercisable by the decedent except in conjunction with the creator of the power—such power shall not be deemed a general power of appointment.

(ii) If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent—such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

(iii) If (after the application of clauses [i] and [ii]) the power is a general power of appointment and is exercisable in favor of such other person—such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power,

such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

* * *

(3) Date of creation of power.—For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942.

Addendum "D"

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§20.2041-1 Powers of appointment in general.

* * *

(b) Definition of "power of appointment"—(1) In general. The term "power of appointment" includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. For example, if a trust instrument provides that the beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment. Similarly, a power given to a decedent to affect the beneficial enjoyment of trust property or its income by altering, amending, or revoking the trust instrument or terminating the trust is a power of appointment. If the community property laws of a State confer upon the wife a power of testamentary disposition over property in which she does not have a vested interest she is considered as having a power of appointment. A power in a donee to remove or discharge a trustee and appoint himself may be a power of appointment. For example, if under the terms of a trust instrument, the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, the decedent is considered as having a power of appointment. However, the the decedent is not considered to have a power of appointment if he only had the power to appoint a successor, including himself, under limited conditions which did not exist at the time of his death, without an accompanying unrestricted power of

removal. Similarly, a power to amend only the administrative provisions of a trust instrument, which cannot substantially affect the beneficial enjoyment of the trust property or income, is not a power of appointment. The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of such fiduciary duties is not a power of appointment. Further, the right in a beneficiary of a trust to assent to a periodic accounting, thereby relieving the trustee from further accountability, is not a power of appointment if the right of assent does not consist of any power or right to enlarge or shift the beneficial interest of any beneficiary therein.

* * *

(c) Definition of "general power of appointment"—* * *

(2) Powers limited by an ascertainable standard. A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of section 2041(b)(1)(A), not a general power of appointment. A power is limited by such a standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). As used in this subparagraph, the words "support" and "maintenance" are synonymous and their meaning is not limited to the bare necessities of life. A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard. Examples of powers which are limited by the

requisite standard are powers exercisable for the holder's "support," "support in reasonable comfort," "maintenance in health and reasonable comfort," "support in his accustomed manner of living," "education, including college and professional education," "health," and "medical, dental, hospital and nursing expenses and expenses of invalidism." In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust his other income before the power can be exercised.

* * *

(e) Time of creation of power. A power of appointment created by will is, in general, considered as created on the date of the testator's death. However, section 2041 (b)(3) provides that a power of appointment created by a will executed on or before October 21, 1942, is considered a power created on or before that date if the testator dies before July 1, 1949, without having republished the will, by codicil or otherwise, after October 21, 1972. * * *

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1457

ESTATE OF EFFIE KELLS JONES, DECEASED, CITIZENS FIRST NATIONAL BANK OF RIDGEWOOD, ADMINISTRATOR, C.T.A., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the United States Tax Court (Pet. App. A2-A17) are reported at 56 T.C. 35. The judgment order of the court of appeals (Pet. App. A1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1973. A petition for rehearing was denied on February 23, 1973. The petition for a writ of certiorari was filed on April 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals and the Tax Court erred in holding that, under New Jersey law, decedent, at the time of her death, possessed the power to invade trust property received under her husband's will for her own benefit without the requisite limitations, so that her power constituted a general power of appointment under Section 2041(a) of the Internal Revenue Code of 1954.

2. Whether the court of appeals and the Tax Court erred in holding that, at the time of her death, decedent possessed a general power of appointment over the trust property within the scope of Section 2041(a) of the Internal Revenue Code, notwithstanding that the power was exercisable by her only in conjunction with a corporate trustee.

3. Whether Section 2041(a), as applied to the power possessed by decedent at her death in 1965, deprives either the decedent or her estate of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

STATUTE AND REGULATIONS INVOLVED

Section 2041(a) of the Internal Revenue Code of 1954 (26 U.S.C.) is reproduced at Pet. App. A18-A21. Section 20.2041-1, Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.), is reproduced at Pet. App. A22-A24.

STATEMENT

Decedent's husband executed a will on April 29, 1940, which provided that at his death the residue of his estate would go to a trust in which decedent (Effie K. Jones) and her husband's daughter by a previous

marriage (Emma) were given successive life estates. The husband died on July 10, 1949, survived by decedent, Emma and Emma's two children. (Pet. App. A3, A6.) His will, never revised before his death, provided in relevant part that trust income and principal were to be collected, held and distributed during decedent's lifetime as follows (Pet. App. A4-A5):

* * * * *

(a) If my said wife, Effie K. Jones, survive me, to pay to her the net income of my residuary estate or of the trust thereof during her lifetime.

(b) If my said wife, Effie K. Jones, survive me, I authorize and empower my executors during the period of their executorship and my trustees thereafter, *in cases of emergency or in situations affecting her care, maintenance, health, welfare and well-being* to pay over to my said wife (in addition to the said income payments) part or all of the principal of my residuary estate or of the trust thereof, or to use and apply part or all of the principal of my residuary estate, or of the trust thereof, for such purposes. *The judgment and discretion of my executors or trustees as to what constitutes an emergency or any such situation,* and as to the continuation of any emergency or any such situation *and as to how much of the principal of my residuary estate or the trust hereof shall be paid or used therein* and to whom it shall be paid and as to how is shall be used and applied and the purposes for which it shall be paid, used or applied, *shall be final and conclusive* and not subject to inquiry or attack in any court, jurisdiction or proceeding and shall be binding upon all who shall have or may become entitled to any right, title or interest in or to my said residuary

estate or the trust thereof, including any who may be minors or under other legal incapacity or not in being.

In the event of any such payment or use of principal, there shall not be any obligation to refund or reimburse the principal out of the income of my residuary estate or the trust thereof. My corporate executor or trustee shall not be under any duty to see to the application of any moneys so paid to my said wife.

(c) Upon the death of my said wife Effie K. Jones, or upon my death if my said wife Effie K. Jones predecease me, and if my said daughter Emma Louise Rector be then living, to pay to my said daughter Emma Louise Rector during her lifetime the net income of my residuary estate or of the trust thereof *or of so much of my residuary estate or of the trust thereof as may then remain.* [Emphasis added.]

Decedent was named and qualified as co-trustee of this trust, as was a commercial trust company named in the will, and both co-trustees served in that capacity during the remainder of decedent's lifetime. (Pet. App. A7.)

Decedent died on November 11, 1965. No invasions of the trust principal were ever made by the trustees, nor were any releases, renunciations, disclaimers or exercise of any powers of appointment made or effected by the trustees or beneficiaries during the remaining sixteen years of decedent's lifetime. (Pet. App. A7.) Decedent's estate filed a federal estate tax return which did not include the value of the trust assets. The Internal Revenue Service determined that the trust property was includable in the gross estate, and petitioner sought a redetermination in the Tax Court. The Tax

Court entered a decision against petitioner, and the court of appeals affirmed. (Pet. App. A1.)

ARGUMENT

The decision below is correct. There is no conflict of decisions or any other reason for further review by this Court.

1. Under Section 2041(a)(2) of the Internal Revenue Code of 1954, the gross estate for estate tax purposes includes the value of all property "with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942 * * *." Section 2041(b)(1)(A) defines "general power of appointment" to include any power which is exercisable by a decedent in favor of himself, his estate, or the creditors of either, including "A power to consume, invade, or appropriate property for the benefit of the decedent" *unless* such power is specifically limited by "an ascertainable standard relating to the health, education, support, or maintenance of the decedent * * *." Where the requisite limiting standards are lacking, a decedent's power to invade the corpus of trust property for his own benefit requires inclusion of the trust assets in the gross estate even though the power was never exercised. *Strite* v. *McGinnes*, 330 F. 2d 234, 238 (C.A. 3), certiorari denied, 379 U.S. 836; *Jenkins* v. *United States*, 428 F. 2d 538 (C.A. 5), certiorari denied, 400 U.S. 829; *Ewing* v. *Rountree*, 346 F. 2d 471 (C.A. 6), certiorari denied, 382 U.S. 918.

The Tax Court, applying New Jersey law, correctly examined the language of decedent's husband's will, and the factual circumstances relevant thereto, to determine the nature of the power he intended to grant to decedent. Because the co-trustees, including decedent, were given complete discretion regarding when invasions

of corpus would be made, and in what amounts, the Tax Court was correct in finding that the necessary limiting standards were lacking, in spite of the general reference in the instrument to "care, maintenance, health, welfare, and well-being."

2. Petitioner argues (Pet. 17-18) that the Commissioner incorrectly determined that decedent's estate should include the trust property merely because she, as life beneficiary, was also a co-trustee. Taxability under Section 2041(a), however, turns not upon whether a decedent was a trustee or a non-trustee beneficiary, but rather upon whether he possessed at his death the exercisable power to invade or consume corpus, or to direct that such invasion or consumption be made, for the benefit of himself, his estate, or his creditors, and it was on the basis of decedent's actual power, not upon her formal role as trustee, that the Commissioner based his position. *Peoples Trust Company of Bergen County* v. *United States,* 412 F. 2d 1156 (C.A. 3); *Ewing* v. *Rountree, supra.* Neither, on the other hand, is it relevant that decedent's power of appointment was exercisable only in conjunction with the corporate co-trustee. Section 2041(b)(1)(C)(ii) of the Code specifically provides that a post-1942 power of appointment exercisable only in conjunction with another is a general power of appointment *unless* that other person has a "substantial interest in the property * * * which is adverse to exercise of the power in favor of the decedent * * *." The latter qualification is not applicable to the corporate co-trustee in this case. Cf. *Reinecke* v. *Smith,* 289 U.S. 172.

3. Petitioner asserts, as it did below (Pet. App. A14-A17), that if decedent did possess a general power of appointment at her death, it was "created on or before October 21, 1942," and since it was not exercised, it should not have been included in decedent's gross

estate according to the law applicable to pre-1942 powers. Under general rules of construction, a will speaks, and powers granted therein take effect, only upon the death of the testator. Congress has created a limited exception to this rule for certain powers taking effect before July 1, 1949, giving them "pre-1942" status, in Section 2041(b)(3), which provides:

> (3) *Date of creation of power.*—For purposes of this section, a power of appointment created by a will executed on or before October 21, 1942, shall be considered a power created on or before such date if the person executing such will dies before July 1, 1949, without having republished such will, by codicil or otherwise, after October 21, 1942.

Decedent's husband executed his will in 1940 and died July 10, 1949. If he had died just ten days earlier, the statutory exception above would have applied and the power would be deemed "created" prior to October 21, 1942, for federal estate tax purposes.

Petitioner claims, however, that it was really the intention of Congress to set a different cutoff date in that provision (namely, July 1, 1951), which would have given the instant power "pre-1942" status. Although the history of this provision is complicated, we do not agree with the petitioner's views of Congress's intention. See H. Rep. No. 327, 82d Cong., 1st Sess., pp. 3, 7; S. Rep. No. 382, 82d Cong., 1st Sess., pp. 2, 8. The short answer to petitioner's argument, however, is that although statutory language should be interpreted in a manner consistent with its context, we know of no case where a court has held that a statutory detail this precise—*i.e.*, a specific date—can be read differently from the way in which the statute is written.

Alternatively, petitioner contends that the cutoff date is arbitrary and results in an unfair application of the statute which deprives decedent of due process. This Court has recently held, however, that a "grandfather clause" in a taxing statute, under which transactions occurring before a certain date retain tax benefits not available with respect to transactions occurring after that date, does not create an arbitrary classification violative of due process requirements if there is any rational justification for the cutoff date. *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4. In this case, when Congress in 1942 enacted the legislation which included property subject to powers of appointment in the taxable estate of the holder of the power, it provided an escape clause with respect to powers created before the date of enactment in order to allow persons who then held these pre-1942 powers to avoid taxation of their estates in the manner set forth in the statute. See Section 2041(a)(1). In subsequent years, Congress extended the grace period during which the pre-1942 powers could be effectively released to July 1, 1951.[1] In 1948, while enacting one of the extensions of this grace period (to July 1, 1949), Congress also enacted the provision at issue here, which extended the date of the testator's death for purposes of determining whether a power created by will is considered created before or after October 21, 1942. Section 2041(b)(3). Petitioner does not appear to question the rational basis either of Congress's allowance of a grace period with respect to the effective release of a pre-1942 power or its provision of a later date of death for purposes of

[1] It is this date which petitioner alleges Congress also intended to use as the cutoff date for the decedent's death in Section 2041(b)(3). See *supra*, p. 7.

defining a pre-1942 power. Instead, petitioner appears simply to regret that the death of the decedent here occurred after the July 1, 1949 cutoff date, so that the power does not come within the scope of the relief provision contained in Section 2041(b)(3). This happenstance, of course, does not render the cutoff date constitutionally invalid. *Maryland Savings-Share Insurance Corp., supra.*

Petitioner also contends that the amendments to the original 1942 legislation enacted when Congress passed the Powers of Appointment Act of 1951, c. 165, 65 Stat. 91, operated retroactively with respect to petitioner in a manner violative of due process requirements. This legislation, however, applied only prospectively to the decedent whose estate is at issue here, because she, as opposed to her husband, died subsequent to 1951. *Ewing* v. *Rountree, supra,* pp. 473-474; see also *Fernandez* v. *Wiener,* 326 U.S. 340, 354-355.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1973.

DOJ-1973-06